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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

UNITED GAS PIPE LINE COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION,
CONTINENTAL OIL COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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LECONTE, SHREVEPORT, LOUISIANA

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United Gas Pipe Line Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on September 8, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix A hereto, infra, page 1a - 22a, is reported at 350 F. 2d 689. The opinion and order of the Federal

Power Commission (R. 395-416) is reported at 31 FPC 1079, and the opinion of the Federal Power Commission denying rehearing (R. 459-465) is reported at 32 FPC 8.

JURISDICTION

The judgment of the Court of Appeals was entered on September 8, 1965 (Appendix B, infra, page 23a). Petition For Rehearing was denied by order issued October 8, 1965 (Appendix C, infra, page 24a). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Does the Natural Gas Act authorize the Commission to require a pipeline company, without its consent, to purchase gas and pay therefor the price established ex parte by the seller under circumstances where the seller has cancelled the contract under which purchases had been made and filed with Commission a higher price for the gas than that contained in the cancelled contract?

2. If so, is the Act to that extent unconstitutional as violative of the due process requirements of the Fifth Amendment to the Constitution of the United States?

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act [Sections 1(b), 7(b), 7(c) and 7(e), 52 Stat. 821, as amended, 15 U.S.C. 717-717W] are set out in Appendix D, infra, pages 25a - 27a.

STATEMENT

United Gas Pipe Line Company (United) is a natural gas transmission company and Continental Oil Company (Continental) is a producer of natural gas.

In 1953 United and Continental entered into a written contract covering Continental's sale to United of gas produced in the Johnson Bayou Field in Cameron Parish, Louisiana. The contract contained fixed rates, plus provision for tax reimbursement by the buyer (R. 191, 195); it was for a primary term of 10 years from January 31, 1953 (R. 196); and it provided that the contract would continue in effect after expiration of the primary term, unless terminated by either party upon 90 days prior written notice (R. 196).[1]

In order to receive Johnson Bayou Field gas into its existing transmission system, United constructed and placed in operation a separator, a meter station and 55 feet of 4-inch line (R. 397).[2]

In October 1963, Continental gave United notice that it was terminating the contract at the end of the primary term (R. 13) and sought to negotiate a new contract with United containing higher prices (R. 14). United

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(1) Continental filed this contract with the Commission (R. 397) and was issued a related certificate of public convenience and necessity on January 4, 1956. (15 FPC 1650).

(2) United was issued a related certificate of public convenience and necessity on February 25, 1955 (14 FPC 582).

was not agreeable to paying the higher prices but offered to continue purchasing at the existing price. Agreement could not be reached and United offered to support an application by Continental to the Commission for abandonment of Continental's certificate to sell (R. 15), and it offered to continue buying at the existing rate until the Commission acted on the abandonment application (R. 15). Continental declined to apply for an abandonment of its certificate, and it rejected United's offer to buy (R. 16).

Continental then filed with the Commission an increased rate and gave notice that the rate would become effective upon termination of the contract (R. 17).

United gave Continental notice it would discontinue receipt of Johnson Bayou Field gas after January 31, 1963, the date Continental's increased price would become effective (R. 19). Continental complained to the Commission, the Commission directed a show cause order to United, and a hearing was held. United's evidence was that it had not discontinued deliveries to any of its customers (R. 20); that it had not removed or altered any of its facilities (R. 21); and that it was not willing to incur the increased cost demanded by Continental because United was experiencing severe competition from intrastate suppliers, having already lost very substantial markets in Texas and Louisiana to such competition (R. 21).

Without considering any other evidence, the Commission found there had been a cessation of gas flows through United's Johnson Bayou facilities and held this

constituted an abandonment of "jurisdictional purchase facilities" (R. 406-407) without the Commission's prior approval granted under Section 7(b). Insisting that the power to authorize abandonment of facilities under Section 7(b) necessarily implied existence of power to order the purchasing of gas at rates fixed ex parte by the seller, the Commission ordered United to purchase Johnson Bayou Field gas in volumes consistent with the cancelled contract and to pay the higher price Continental had established ex parte (R. 408).

"Not so sure just what the effect might be" of the Commission's conclusion that United had abandoned physical facilities, the reviewing court affirmed the Commission's order on the basis of its view that Section 7(b) applied to the buyer as well as the seller in a "jurisdictional sale" and that both must obtain Commission approval before terminating the transaction. The court held that in this case there was no rate other than Continental's ex parte established rate, and that consequently United had no choice but to pay it until granted abandonment authorization pursuant to Section 7(b).

REASONS FOR GRANTING THE WRIT

With the decision below the Commission has, for the first time in the history of the Act, assumed to require the purchasing of gas and the payment therefor of a price fixed ex parte by the seller. The decision unlawfully extends the Commission's jurisdiction, and it adversely affects the public.

Until this decision, both the Commission and the industry have acted on the assumption that the purchaser's obligations to buy were solely those to which he had agreed contractually. Never before has any purchaser been required to obtain authorization under Section 7(b) to stop purchasing gas; and never before has Section 7(b), or any other section of the Act, been relied on to compel a purchaser to pay an increased price for gas established ex parte by the seller.

The decision below withdraws from the buyer his bargaining strength and denies him control over the price he will pay for gas. It renders the buyer's resale of gas at contractually fixed prices economically ruinous. And in areas of vigorous market competition from intrastate suppliers, including Texas, Louisiana and Mississippi in which United operates, it destroys the interstate pipeline's ability to control its costs in competing for local markets. The decision distorts the Act, it seriously damages pipeline purchasers, and it will result in higher gas prices to the public. In addition, it conflicts in principle with the decisions in *United Gas Pipe Line Company v. Mobile Gas Corp.*, 350 U.S. 332, and *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137.

1. *The Act Does Not Regulate Purchasing.* In common with the plan of utility regulatory statutes in general, the Act regulates the sale and not the purchase of gas. Legislative history shows that Congress considered and rejected a bill to bring purchasing of gas by pipelines

under the Commission's control.[3] In stating the reach of the Commission's jurisdiction, Section 1(b) does not include purchasing. In granting the Commission power to require and issue certificates of public convenience and necessity, Sections 7(c), and 7(e) do not require or permit issuance of certificates to purchase. And in requiring prior Commission approval for abandonments, Section 7(b) does not mention or include purchasing. Clearly, the decision below is grossly in error in extending the Commission's regulatory control to purchasing.

2. *The Act Permits The Buyer To Reject A Seller's Ex Parte Established Price.* In requiring United to pay the seller's ex parte established price, the decision below conflicts in principle with this court's decision in *United Gas Pipe Line Company v. Mobile Gas Corp.*, 350 U.S. 332, and in *United Gas Pipe Line Company v. Memphis Light, Gas & Water Division*, 358 U.S. 103.

In *Mobile*[4] this court held:

"All of the relevant provisions of the Act can thus be fully explained as simply defining and implement-

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(3) While Congress was considering the passage of the Natural Gas Act, a bill (HR 5711 and S 1919, 75th Cong. 1st Sess.) was introduced in both houses of Congress on March 17, 1937, which provided that "this Act shall apply to the procurement of natural gas for the purpose of its transmission through pipe lines and its sale, exchange, transmission, or distribution in interstate commerce * * *". The provisions of this bill, however, failed of adoption; instead Congress enacted Section 1(b) with its specific exemptions from the coverage of the Act. Cognizance was taken of this in *FPC v. Panhandle Eastern Pipeline Co.*, 1949, 337 U.S. 498, 513 n. 16, 69 S. Ct. 1251, 93 L. Ed. 1499.

(4) 350 U.S. at page 343.

> ing the powers of the Commission to review rates set initially by natural gas companies, and there is nothing to indicate that they were intended to do more. * * * The obvious implication is that, except as specifically limited by the Act, *the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: to establish ex parte, and change at will, the rates offered to prospective customers;* or to fix by contract, and change only by mutual agreement the rate agreed upon with a particular customer."(5) (Emphasis ours)

Having established its rate ex parte and without the buyer's assent, the seller could do no more than offer it to United as a "prospective customer" as stated above in *Mobile.* While the decision below preserves to the seller the right to fix it rate ex parte, it denies absolutely to the buyer its right to accept the offered rate or to reject it. The decision below thus unlawfully withdraws from the buyer the bargaining and contracting power which *Mobile* recognizes the buyer has.

3. *The Decision Is Contrary In Principle To The Plan Of The Act As Recognized In Sunray.* In *Sunray,* the Commission's power to tender the seller a certificate unlimited as to time was sustained. In doing so the court pointed out that upon expiration of the term of a limited certificate the seller would have been free to discontinue sales without seeking abandonment authorization under

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(5) This holding was repeated in *Memphis,* 358 U.S. at page 110

section 7(b).[6] Thus the holding in *Sunray* was: (1) that acceptance of an unlimited certificate to sell imposed an obligation on Sunray to sell after expiration of its sales contract; and (2) that continued existence of the certificate was the necessary prerequisite to the application of Section 7(b) after expiration of the sales contract. United has no certificate to purchase Johnson Bayou Field gas, and the Act does not authorize issuance of such a certificate. In this case, as in *Sunray*, absence of a certificate means: (1) United is free to discontinue purchases upon expiration of its gas purchase contract; and (2) the prerequisite to application of Section 7(b) does not exist.

In *Sunray* the court noted with particular care that the certificate imposed an obligation on the seller "to deliver gas to United on the latter's request"[7] after expiration of the sales contract, unless seller could justify an abandonment of deliveries to United. This explicit recognition of the permissive nature of the buyer's right, to "request" deliveries, is obviously consistent with the plan of the Act; for the Act (according to *Sunray)* affords the buyer no protection against unilaterally increased rates, other than it does not take from the buyer the right (noted in *Mobile)* to accept or reject as a prospective customer gas offered at rates established ex parte by the seller.

The Act grants the Commission rate "review" power, it does not grant it power to "make" rates to recover any costs including those its order here forces on

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(6) 364 U.S. at page 142.

(7) 364 U.S. at page 155.

United; the Commission has no rate jurisdiction over direct industrial sales; and the Commission has held it is powerless to protect interstate sales against prejudicial intrastate competition. The Act does not permit Continental's ex parte rate to be tested for justness and reasonableness by the needs or earnings of United. Under the plan of the Act United can maintain its markets and earn a fair return to the extent its own business judgement and its own arrangements with its customers permit. While the Act affords United neither protection against the seller unilaterally increasing its rates nor assistance in recovering increased costs, the Act does not take away from United its right to control its costs (by agreement to the rate it will pay for gas) and the decision below errs in holding the contrary.

4. *If The Act Permits Issuance Of The Order, It Is To That Extent Unconstitutional.* The order takes United's property without due process, including adequate compensation, required by the Fifth Amendment to the Constitution of the United States.

The Commission's order forceably takes cash from United and gives it to Continental in the form of the increased price demanded and fixed ex parte by Continental. United's private property is thus taken for the private benefit of Continental, without any finding by the Commission that the taking is required for public convenience

and necessity and without any provision for compensation to United for the taking of its property.(8) United stressed to the Commission that the Natural Gas Act does not guarantee United any market, or any return on its investment in facilities, or even protection from discriminatory intrastate competition from those, including Continental, who would unilaterally fix the price United must pay for gas (R. 438). Because United must maintain its markets, and fix its rates to recover its costs and earn a fair return on the basis of its own arrangements with its customers, should the Act expressly permit the Commission to force United to pay Continental its unilaterally increased cost for gas, the Act would be to that extent arbitrary and a denial of due process of law.

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(8) Exercise of the commerce power is subject to the Fifth Amendment. *Currin v. Wallace*, 306 U.S. 1, 14. In *Republic Natural Gas Company v. Oklahoma*, 334 U.S. 62, 99, Mr. Justice Rutledge, joined by Mr. Justice Black, Mr. Justice Murphy and Mr. Justice Burton, dissenting (the majority did not reach the merits) expressed the opinion that forced purchasing required of pipelines under an Oklahoma common purchaser statute(later held constitutional in *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179) did not contravene constitutional guarantees because the statute authorized the state corporation commission to fix the terms of the forced purchasing in such a way as to insure reasonable compensation to the pipeline purchaser.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 21693

UNITED GAS PIPE LINE COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

Petition to Review and Set Aside Order of the Federal Power Commission.

(September 8, 1965.)

Before BROWN and GEWIN, Circuit Judges, and KILKENNY,* District Judge.

BROWN, Circuit Judge: The qusetion here is whether on expiration of the underlying gas sales contract with the seller still committed under the Natural Gas Act, the

*Of the District of Oregon, sitting by designation.

pipeline purchaser may be compelled to take deliveries at unilaterally increased prices until such time as the FPC approves abandonments. The FPC gave an affirmative answer. We agree and enforce.

Although decision is far from easy, the facts out of which the problem emerges are simple, neither complex nor conflicting.

In January 1953 Producer(1) and Pipeline(2) contracted for the sale and purchase of gas from Producer's Johnson Bayou Field, Louisiana. This contract was for a primary term of ten years from January 31, 1953, and was subject to termination after the primary term upon notice by either party. During the term of the contract the specified contractual rate was 10.077¢ per Mcf including tax reimbursement. The contract was filed with the FPC and accepted as Producer's Rate Schedule No. 115. Producer sought and obtained a certificate of public convenience and necessity authorizing the sale of gas to Pipeline in accordance with its filed rate schedule (of which the contract was the embodiment) and commenced initial delivery of gas on January 31, 1955.(3) Pipeline also sought and obtained a certificate of public convenience and necessity authorizing the construction of facilities neces-

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(1) Continental Oil Company.

(2) United Gas Pipe Line Company.

(3) Producer was issued a certificate for this sale at Docket G-6949.

sary to take the gas from Continental.[4] Both Producer and Pipeline did in fact construct facilities in Johnson Bayou Field to permit the sale, purchase and taking of such gas. The Johnson Bayou gas comes from two wells completed on Producer's lease in the field. The facilities installed by Producer were more extensive[5] than those of Pipeline.[6] The delivery point of the gas is located at a valve at the juncture of Producer's 2-½ inch flow line and Pipeline's 4 inch pipeline. These facilities were used continuously for delivering and taking the gas from the time of initial delivery on January 31, 1953, until Pipeline shut off the valve and ceased taking gas on January 31, 1963.

As permitted under the contract, within ninety days prior to the expiration of the primary term of the contract, Producer gave notice to Pipeline of termination of the contract at the end of the primary term. This notice

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(4) Pipeline was issued a certificate by the Commission at Docket G-2818 on February 25, 1955 in United Gas Pipe Line Co., 14 FPC 582, "authorizing the continued transportation of natural gas by [United] in interstate commerce" and authorizing "the construction and/or operation of any facilities used for the transportation or sale of natural gas in interstate commerce" by United.

Field facilities are characterized by FPC as "purchase facilities" in its Rules (18 CFR §2.58) and Regulations (18 CFR §157.7).

(5) They comprised approximately 4,400 feet of 2-½ inch flow line, two separators and a battery of storage tanks near the separators.

(6) They were 55 feet of 4 inch pipeline leading from Producer's flow line to Pipeline's Mud Lake transmission line, and also a separator and meter station. The initial installation cost was about $7,000.00.

of termination was acknowledged by Pipeline. The contract expired according to its terms on January 31, 1963. Producer's effective rate schedule was not terminated, however.

During the last months of the contractual term, Producer and Pipeline endeavored to negotiate a new contract. These negotiations were unsuccessful. In brief, Pipeline's position was essentially an offer to extend the old contract either on a relatively long-term basis at the same price and other terms, or on a day-to-day basis at the same price and other terms. Producer sought a new long-term contract with an increased price reaching 18.75¢ mcf but within the range of the applicable current South Louisiana price level under General Policy No. 61-1 for "old" gas. When negotiations broke down, Pipeline advised Producer that it did not need the gas, and that it would support an application by Producer for abandonment of the certificate. Producer declined and gave the notice of termination.

After giving notice of termination, Producer filed in December 1962 a notice of change in rate pursuant to §4(e) effectuating a unilateral change in rate under its Rate Schedule No. 115 effective January 31, 1963. This provided for an increased rate to 15.75¢ per mcf including tax reimbursement.(7) Producer's existing rate schedule remained effective and unchanged in all other respects.

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(7) This rate did not exceed the applicable area rate level for South Louisiana under AR 61-1. See §2.56, 18 CFR (Cum. Supp. 1964) 2.56.

FPC accepted the rate change to become effective without suspension. Although Pipeline opposed the filing of the unilateral rate change and unsuccessfully sought rehearing of the approval order, Pipeline did not take timely review of this order. The order permitting the rate increase to become effective thus became final.(8)

On learning of the final order approving the rate increase, Pipiline notified Producer just two days prior to the expiration date (January 31, 1963) that it would not continue to purchase gas from Johnson Bayou Field after that date. Pipeline did not request permission from FPC to cease operating the facilities used in taking gas or to abandon the service, or the purchase, transmission and resale of Johnson Bayou gas. In accordance with its notice, Pipeline ceased taking the gas on January 31, 1963.

Almost immediately Producer petitioned the FPC to direct Pipeline "* * * to show cause why it should not be required to continue to take deliveries of gas produced * * * in the Johnson Bayou Field * * * at the currently filed and effective rate * * *." Declining this relief, the FPC did direct Pipeline to show cause "why it should not be required to apply for and obtain the permission and approval of the * * * Commission before ceasing the operation of all or any portion of the facilities heretofore operated by [it] to purchase natural gas from" the Producer. After a hearing the Examiner's initial decision dismissed the show cause order, but on review and oral

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(8) Continental Oil Co., 29 FPC 525, 526.

argument, the Commission,[9] by divided vote,[10] in an opinion by Commissioner O'Connor held that the Pipeline's refusal to make any use, for an indefinite time, of the facilities for the purchase of gas constituted an abandonment under §7(b) and it ordered Pipeline to resume purchasing gas at the rate specified in Rate Schedule No. 115.

There was great preoccupation with *cessation*.[11] Undertaking to answer the attacks which are reiterated here by the Pipeline[12] and stressing the importance of §7(b),[13] the opinion emphasized that this section "frames the relevant issue, not in terms of whether this Commission has the power to compel continued purchases, but whether the 'public convenience and necessity' dictates that pipe lines *cease* purchasing * * *." (Emphasis the Commission)

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(9) Opinion No. 426, 426A, 31 FPC . . . . .

(10) The late Commissioner Woodward dissented.

(11) E.g., the question as posed by the FPC was: "* * * whether the *cessation* of gas purchases with the concommitant nonuse of jurisdictional gas purchasing facilities, where there is no present intent to renew such purchases, constitutes an abandonment within the scope of" §7(b). (Emphasis supplied)

(12) As an ally it is joined by Texas Eastern Transmission Corporation, an intervenor, on both brief and argument.

(13) §7(b) provides:
"No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuancy of service is unwarranted, or that the present or future public convenience or necessity permits such abandonment." 15 USCA§ 717f(b).

But it seems quite clear that the FPC hardly thought that the impact of its decision was any different by casting it in terms of a requirement that permission be obtained to *cease* performance rather than an order *compelling* continuation of an activity. Thus, describing the contention that although the producer must continue to sell while the Pipeline-Purchaser need not buy, as "paradoxical results" to which "we cannot subscribe" the FPC concluded "that if the power to compel the continuation of sales is not to be reduced to mere illusion, the power to *compel* the continuation of purchases must be its correlative." And in ordering Pipeline "to renew the use of these facilities," pending an abandonment proceeding,[14] Pipeline was ordered to make "purchases * * * at * * * [the] currently effective filed rate, and in volumes consistent with the terms of the previously effective contract."

Stressing that by this decision the FPC "for the first time in the history of the * * * Act orders a pipe line: (1) to purchase gas; (2) to pay an increased price fixed unilaterally by the seller; and (3) to buy volumes controlled by a cancelled contract," Pipeline levels a broadside attack.

Pipeline takes the flat position that after the expiration of the sales contract, it cannot, under the Act, be compelled to continue purchases. Whether it continues is a volitional action of its own to be determined solely by

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(14) The opinion expressly recognized that the "order is without prejudice to the institution by [the Pipeline] of a formal abandonment proceedings."

it and on terms which it deems acceptable. And the FPC may not bring about this unauthorized result by treating discontinuance of gas purchases as an abandonment of physical facilities through which delivery of the gas has previously been effected. Indeed, the argument continues, the Act is so structured that on this eventuality Pipeline is to be considered as a prospective purchaser as to whom the FPC lacks power to prescribe initial rates. Underlying it all is the insistence that the *purchase* of gas is a non-jurisdictional activity and since the FPC may neither grant, not require application, for a certificate, for the purchase of gas, there is nothing the purchaser can abandon when the contract expires on its own terms.

In the analysis of these objections and the infinite variable shadings of them, some steps are easy, some not so easy. And in the process, we see again that the weapons of attack and defense are practically the same, each faction embracing now this, now that, opinion of the Supreme Court.

Although without more we are not so sure just what the effect might be, we have no doubt that the FPC was authorized on this record to conclude that Pipeline's conduct was an abandonment of the physical facilities for delivery of the gas. Of course the facilities being essential to interstate transportation of gas, they were "jurisdictional," *Panhandle Eastern Pipeline Co. v. Public Serv. Comm'n of Indiana*, 1947, 332 U.S. 507, 68 S.Ct. 190, 92 L.Ed. 128, for which a certificate was both required, §7(c), and issued, §7(e) (see notes 4, 6, *supra*). That these facilities were simple in nature and small in cost is of no

consequence. And whatever might be the status of parts of the equipment geographically more removed, it has been plain in this Circuit ever since *Continental Oil Co. v. FPC*, 5 Cir., 1959, 266 F.2d 208,[15] that the very last piece which effects the entry of the gas into the interstate stream is jurisdictional and not insulated from regulation by the production and gathering exclusion of §1(b), 15 USCA §717(b). And see *Ben Bolt Gathering Co. v. FPC*, 5 Cir., 1963, 323 F.2d 610.

But, Pipeline insists, granting all of this, there has yet been no abandonment either in fact or in law since the facilities remain intact ready for operational use once there is a need for them. The law, however, is hardly that unrealistic. The facilities, it may be assumed, are maintained in good order ready for immediate resumption of use. But the use is to be on the terms, under the conditions and at the volitional desire of Pipeline. Once dedicated to the public use, the facilities are now withdrawn to the status of private property unburdened of the public interest or public regulation.

But this conclusion does not solve this case. A simple order to resume *use* of the facilities if complied with would, to be sure, resume the flow of gas—even unwanted gas. Further, the receipt of gas would impose, one would think, some character of obligation on the receiver to pay for it, perhaps measured by what it is worth to the re-

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(15) We there expressly approved J. M. Huber Corp. v. FPC, 3 Cir., 1956, 236 F.2d 550, cert. denied, 352 U.S. 971, 77 S.Ct. 363, 1 L.Ed.2d 324.

ceiver — an obligation which, incidentally, Pipeline is willing to bear.[16] But here the order requires that Pipeline (a) take gas and therefore put facilities to use and (b) pay the rate prescribed unilaterally by Producer. Full recognition of a public duty clearly includes (a) but not necessarily (b).

It is at this point that all of the arguments, theories, and counter arguments, counter theories intertwine to justify a result different from the likely one had each been carefully compartmentalized.

Thus, one must acknowledge a good deal of force to Pipeline's contention that under *Mobile*[17] and *Memphis*,[18] initial rates are fixed alone by the contract[19]

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(16) Indeed, one might wonder what the position would have been had Pipeline, acquiescing in a mandatory order to resume taking, merely stated that for such gas it would pay such amount as found due by a court judgment in an action brought by Producer for goods sold and delivered. Cf. United Gas Pipe Line Co. v. Tyler Gas Service Co., 5 Cir., 1957, 247 F.2d 681; Tyler Gas Service Co. v. FPC, D.C.Cir., 1957, 247 F.2d 590; Tyler Gas Service Co. v. United Gas Pipe Line Co., 5 Cir., 1954, 217 F.2d 73.

(17) United Gas Pipe Line Co. v. Mobile Gas Service Corp., 1956, 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373.

(18) United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div., 1958, 358 U.S. 103, 79 S.Ct. 194, 3 L.Ed.2d 153.

(19) Of course even the most intransigeant anti-regulation-purist must recognize that this absolute, like most, is also unabsolute. For the right to fix the initial price is of little value unless the sale is certificated thereby bringing into play the FPC's awesome power to reject out-of-line prices under *CATCO* (Atlantic Refining Co. v. Public Service Commission, 1959, 360 U.S. 378, 79 S.Ct. 1246, 3 L.Ed.2d 1312), condition a temporary, FPC v. Hunt, 1964, 376 U.S. 515, 84 S.Ct. 861, 11 L.Ed.2d 858, 886, reversing, 5 Cir., 1962, 306 F.2d 334, or perhaps even a permanent, Callery Properties, Inc. v. FPC, 5 Cir., 1964, 335 F.2d 1004, cert. granted, 1965, ...U.S....., ...S.Ct....., 13 L. Ed.2d 820.

and this sales contract having expired, Pipeline's status is that of a *prospective* customer. Thus, the Court declared, the "* * * initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act." The rate provisions, the Court went on, simply define and implement "* * * the powers of the Commission to review rates set initially by natural gas companies, and there is nothing to indicate that they were intended to do more." Recognizing that a gas company under the Act may make, and change, contract rates, the Court summarizes this as the power "* * * to establish ex parte, and change at will, the rates offered to *prospective* customers; or to fix by contract, and change only by mutual agreement the rate agreed upon with a particular customer." 350 U.S. 332, 343.

To this the Pipeline can add the further weighty argument that the Act is carefully limited. Speaking of §1(b), the Court early said, this "section determines the Act's coverage and does so in the light of the situation existing at the time. Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale." *Panhandle Eastern Pipeline Co. v. Public Serv. Comm'n of Indiana*, 1947, 332 U.S. 507, 516, 68 S.Ct. 190, 92 L.Ed. 128. There is in the Act no provision that a purchaser must, or even may, obtain a certificate to purchase gas. Its duties *vis-a-vis* a seller-producer are

therefore solely a matter of the contract,[20] all such duties evaporating once it is extinguished.

But sound as all this literally may be, it does not reckon with the continuing obligation of the Producer-seller over and beyond the contract period even to the point of exhaustion of reserves. Paraphrasing *CATCO*, the Court in *Sunray* (see note 23, *infra)* described the situation:

> "* * * An initial application of an independent producer, to make movements of natural gas in interstate commerce, leads to a certificate of public convenience and necessity under which the Commission controls the basis on which 'gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval. The gas operator, although to this extent a captive subject to the jurisdiction of the Commission, is not without remedy to protect himself.' 360 U.S. at 389."[21]

Of course, as a matter of *contract*, the seller-producer volitionally intends to sell for the life of the contract only. Likewise, as a matter of contract, the purchaser volitionally intends to buy for the period only. But whether

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(20) The Pipeline carefully disclaims any right to take unilateral non-FPC approved action during the life of the contract. It never quite says why—because the contract, as a contract, is binding and independent action would be fruitless? or because by virtue of the Act performance under the contract generates, or releases, legal power in the FPC to regulate purchasers as well as seller for the duration?

(21) 364 U.S. 137 at 156.

the conceptual approach is that of Austin or of Blackstone,[22] the fact now is, as revealed by *Sunray*[23] and *Sun*,[24] both seller and buyer have to recognize, whether they know it or not, that the Act imposes a continuing obligation on the seller. If — and there is no real if — the Act imposes obligations beyond[25] the contract as to one party in order to achieve the aim of the statutory scheme, it hardly makes sense in the divination of congressional purpose to assume that only one side of the transaction was to be subject to immediate, continuous, and perpetual obligation and regulation.

It is not forbidden judicial legislation to give Congress credit for desiring symmetry. Many signs point in that direction. One surely is the fact that regulation of long line transmission-pipeline purchases or carriers was a principal object of the Act to bridge the gap between permissible and nonpermissible local, state regulation.

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(22) Linkletter v. Walker, 1965, ... U.S.... , ... S.Ct....., 14 L.Ed.2d 601, 604-05 reversing, 5 Cir., 1963, 323 F.2d 11.

(23) Sunray Mid-Continental Oil Co. v. FPC, 1960, 364 U.S. 137, 80 S.Ct. 1392, 4 L.Ed.2d 1623.

(24) Sun Oil Co. v. FPC, 1960, 364 U.S. 170, 80 S.Ct. 1388, 4 L.Ed.2d 1639, affirming, 5 Cir., 1959, 266 F.2d 222. In many ways this case transcends *Sunray*. For in *Sun* the question was not power to grant unlimited certificates, but whether the producer-seller was restricted to the old price under the expired contract.

(25) We are dealing, of course, with the statutory obligation, rights, etc. Consequently, the fact that Congress as it did by the provisio of §5(a) puts limits, or even prohibitions, on the exercise of regulatory power does not demonstrate an absence of a purpose to regulate.

FPC v. Hope Natural Gas Co., 1944, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333. And *Mobile* articulated what our own abundant exposure to the endless list of post-*Phillips* fall-out[26] cases teaches us, that contracts for the purchase of gas, usually long term and oftentimes in express terms of dedication of reserves, underlie the whole intricate structure of transcontinental lines.[27] What is so vital to financiers, enterpreneurs, and the FPC initially hardly becomes less so as the years go by. A marker in the opposite direction is, of course, congressional rejection in 1938 of proposals that the Act expressly identify purchasers as a category for regulations.[28] But there are ample

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(26) Phillips Petroleum Co. v. Wisconsin, 1954, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035.

(27) See, e.g., 18 C.F.R. §157 and particularly §157.14(10):

"Exhibit H—Total gas supply data. A statement of the total gas supply committed to, controlled by, or possessed by applicant which is available to it for the acts and the services proposed, together with:"

(i) estimated proven reserves in place
(ii) estimated proven reserves available by fee or lease
(iii) gas purchase contracts
(iv) deliverability study
(v) conformed copy of each gas purchase contract
(vi) Btu content estimate
(vii) maps showing location, proven limits, acreage, gas volume, pipelines to be utilized
(viii)
(ix) study of proposed gas storage fields.

(28) Pipeline's brief points out that while Congress was considering the passage of the Natural Gas Act, a bill (HR 5711 and S 1919, 75th Cong. 1st Sess.) was introduced in both houses of Congress on March 17, 1937, which provided that "this Act shall apply to the procurement of natural gas for the purpose of its transmission through pipe lines and its sale, exchange, transmission, or distri-

reasons to dispel any apparent inconsistency. A major factor may well have been a confidence that with the regulation prescribed including that on producer sales,[29] the public interest was adequately guarded under a scheme which simultaneously gave gas purchasers sufficient freedom of choice since it was — and still is for that matter — the sole volitional decision to *purchase* initially that subjects seller and buyer to duties transcending the contract. The buyer, as much as the seller, sets the machinery in motion.

Pipeline, far from fleeing before *Sunray*, urges strenuously that the Court inescapably envisioned the reverse situation — the one presented here — and predetermined that the purchaser is free to take or not to take or to take on its own terms. Pipeline finds this in the Court's emphasis on the elective nature of the buyer's actions. Thus, the Court stated, "During its term, both parties are bound by it to the same extent as any members of this regulated industry. When it expires, [seller], to be sure, will be under an obligation to continue to deliver gas to United [purchaser] on the *latter's request* unless it can justify an abandonment before the Commission * * *." This is repeated, so it is urged, in the analysis

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bution in interstate commerce * * *." The provisions of this bill, however, failed of adoption; instead Congress enacted Section 1(b) with its specific exemptions from the coverage of the Act. Cognizance was taken of this in FPC v. Panhandle Eastern Pipeline Co., 1949, 337 U.S. 498, 513 n. 16, 69 S.Ct. 1251, 93 L.Ed. 1499.

(29) This 1938 congressional purpose was discerned in 1954. Phillips Petroleum Co. v. Wisconsin, 1954, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035.

of the newly declared Act-imposed, post-contract duties of the seller. The seller "* * * will be free then, as it was not free during the contract term * * * to make rate changes under §4 without [purchaser's] consent. It is said that [seller] will be in a position of inequality, because it must supply gas then to United [purchaser] without a corresponding obligation on United to take it." Especially is this so since the pressures on the buyer are not those of the Act, but rather of the market place. For this the text is found in these words. "But United, subject to the Act in its sales to local distributors, has its obligations too; and if in fulfilling them it desires to have a continuing supply of gas with the stability of price protection which a contract furnishes under Mobile, it may be discovered that each side has its bargaining strength."

We do not believe the Court had any such purpose, but fortunately if what we say it said is not what it said, the instant case affords the vehicle for resolution, 28 USCA§1254. First, the Court was analyzing again the *Mobile-Memphis* concept of integrity of contract. Next, it was dealing with the obligation of the seller-producer, not the purchaser. Also, one of the emphasized statements from the Court's opinion follows on the heels of the ambiguous phrase "it is said" as though, perhaps, the Court was seeking to answer an argumentative contention, not canvass factors or declare legal principles.

But we would not approach it so narrowly. We think that in at least two respects, the opinion in *Sunray* necessarily contemplates that the purchaser is subject to

the restraints of the Act after the expiration of the sales contract. There is, first, the Court's consideration of the resulting predicament if expiration of the contract were held to extinguish the regulatory power of the FPC. Such a result, it pointed out, would bring into operation the right of the seller, as a part of a new certificate, to file rates for the "new" service under §4(c). This would leave the FPC with nothing but the awkward, time-consuming and reverse burden of proof of a §5 proceeding. But if the seller were still obligated, the Court went on, "* * * the rates to be charged under a new contract or otherwise would have to be filed as rate changes under §4(d) of the Act, with 30 days' notice to the commission and the public." This would permit not only suspension, §4(e), but at the hearing the seller "* * * would have to shoulder the burden of proving that its new rates were just and reasonable." This led the Court to conclude, "* * * Clearly, the rate change provisions of §§4(d) and 4(e), rather than the 'initial rate' provisions of §4(c), are better tailored to the situation that exists when the initial contract of sale of natural gas terminates, and the supply of gas continues." Unlike a really "new" service as to which "* * * the protective provisions of §§4(d) and (e) * * * are not relevant," this is "not the case where one sales contract expires and service continues" for in that event, "the protective provisions fit as well as they do in the case of a rate change made pursuant to a contract, during its term." 364 U.S. 137, 144-147.

But more direct was the Court's consideration of the term "service" as used in §7(b) and §7(e). The

Court's analysis followed these steps. First, "* * * under §7(e) the Commission is authorized to issue a certificate authorizing the 'service' covered by the application as well as a 'sale.'" Next, §7(c) sets "forth no specific antecedent for the 'service' to which §7(e) refers." Consequently, "it might well be thought that one who 'engage[s] in the transportation or sale of natural gas,' which §7(c) does refer to, is performing a 'service' within the meaning of §7(e). Certainly there is no more likely antecedent in §7(c)." Added proof was found in §7(e) and its certification requirement of a dual finding "that the applicant is willing and able "to do the acts and perform the service proposed.'" Consequently, the Court declares, "§7(e) itself gives positive indication that the 'service' which the Commission's certificate may authorize is something quite apart from simply the specific sales which §7(c) forbids without a certificate sufficient to authorize them***."(30) 364 U.S. 137, 144, 146-7.

Blending these two approaches — (1) reliance on §4(d) and (e) and (2) "service" encompassing "sale" and vice versa — it is inconceivable that the Court could have been treating the seller as subject to awesome regulation at a time the other necessary party to the activity was scot free. Thus, for example, under the structure of §4, a certificated seller may charge only the filed rates. Using, as *Sunray* requires, §4(d) and (e), the FPC must

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(30) See also 364 U.S. at 162-166, Justice Harlan dissenting, recognized that service did encompass things other than sales or transportation, and that the obligations of a pipeline are continuing and not limited by contract.

determine the "lawfulness" of the rate, whether suspended or not, since all rates — initial under §4(c) or changes under §4(d) and (e) — must meet the "just and reasonable" standard of §4(a). It is incongruous to suppose that the regulatory agency charged by Congress with achieving the objectives of this legislation is to fulfill this role by a perfunctory stamp of approval on a rate submitted by a seller under the pressure of a freewheeling and independent purchaser on a take-it-or-leave-it basis. And since, for §7 purposes, "service" includes "sale" and vice versa, each of the two parties to a sale — seller and purchaser — necessarily are performing that kind of service. The purchaser's part in a sale, certainly of gas, is vital. It must take it and it must pay for it. And equating "service" with "sale", it, like the seller has an obligation both to (a) take and (b) pay that transcends the contract.

This discussion of *Sunray* demonstrates, we think, that Pipeline is incorrect in urging that without certification of the purchase or certificating the purchaser there is no duty of one subject to the Act to obtain FPC permission before abandonment of one side of the jurisdictional sale. The "service" is rendered by seller and buyer, and each must serve on until excused under §7(b).

Other things likewise point away from the proposition that the FPC's power to require abandonment is equated with the power initially to certificate. As the brief for the FPC points out as originally enacted in 1938, certification was required only for a proposed entry into

an area already served.[31] The legislative history reflects a congressional awareness of the need for an effective abandonment procedure.[32]

The price to be paid for gas is important. Indeed, in most of the cases, this seems to be the predominant factor. But the supply of gas is equally important. *Callery Properties v. FPC*, 5 Cir., 1964, 335 F.2d 1004, 1012-13, cert. granted, 1965, ... U.S. ....., ... S.Ct. ....., 13 L.Ed. 2d 820. And it is for the FPC, at least initially, to strike the balance on price and supply in fulfilling its statutory role in determining whether the gas "is or will be required by the present or future public convenience and necessity," §7(e). Withdrawal of gas from the interstate market which the producer is mandatorily required to make available because the purchaser, for its own economic reasons, concludes the price is too high shifts from the governmental agency to a private interested party the determination of this critical problem of the needs of the public, not alone for today, but for the explosive tomorrow. *Detroit Cleveland Steamship Co. v. United States*, 1945, 326 U.S. 236, 66 S.Ct. 75, 90 L.Ed. 38.

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(31) This was amended 1942. 56 Stat. 83. See FPC v. Texaco, Inc., 1964, 377 U.S. 33, 84 S.Ct. 1105, 12 L.Ed.2d 112.

(32) See, e.g., hearings on H.R. 11662, 74 Cong. 2d Sess., at p. 92; the House Committee rejected a proposal that abandonment be allowed "without obtaining such permission, approval or finding, if service is not thereby impaired or if substitute facilities will be installed." See hearings on H.R. 4008 before House Committee on Interstate and Foreign Commerce, 75 Cong. 1st Sess. at p. 127.

Holding, as we do, that the FPC has the power and the duty to require that it approve any abandonment of this service by Pipeline, we can briefly dispose of the remaining contentions.

Although it is probable that the impression comes from Pipeline's arguments designed to show that the FPC on brief and argument here is attempting to confine the issue to the necessity for a §7(b) permission to *cease* purchasing of gas rather than the intrinsic question of an order affirmatively requiring taking of gas at an increased unilateral rate, there is a possible suggestion that the issues were inadequately defined from a procedural standpoint. We think there is nothing to this. All parties were fully informed of what was at stake.

Objections that the record evidence does not justify the FPC's implied conclusion that the order under attack is needed to preserve the status quo are really premature. All that the order holds is that pending determination on Pipeline's application for a §7(b) abandonment, Pipeline must continue to take and pay the only outstanding (and hence lawful) rate. The FPC for ample reason declined to consider the intrinsic merits of the problem until the abandonment application is filed.

This likewise takes care of Pipeline's assertion that this is an unconstitutional deprivation of its property without due process. All of these issues bearing upon Pipeline's need, the public's need, the reasonable need so far as price is concerned are all matters for consideration in the abandonment proceeding. For all we know, once the

FPC's power is established as it is done here, Pipeline may find itself now surrounded by energetic local distributor intervenors as new allies urging the FPC to require abandonment because the Producer's rate is too high. See, *United Gas Improvement Co. v. Continental Oil Co.; FPC v. Marr*, 1965, ... U.S. ....., 85 S.Ct. ....., 14 L.Ed.2d 466, reversing 5 Cir., 1964, 336 F.2d 320. The FPC may be persuaded and confiscation will also evaporate.

This leaves only the tag end that the order, authorizing a unilateral change in increase in rates, holds the Pipeline's feet to the fire as to the other terms and conditions of the expired contract. To the extent that this really presents a problem, it, too, can be the subject of a factual inquiry and conditional order on the abandonment proceedings.

ORDER ENFORCED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1964

No. 21693

UNITED GAS PIPE LINE COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

Petition to Review and Set Aside Order of the Federal Power Commission.

Before BROWN and GEWIN, Circuit Judges, and KILKENNY,* District Judge.

JUDGMENT

This cause came to be heard on the petition of United Gas Pipe Line Company, for review of Order of the Federal Power Commission, issued on May 5, 1964, in Docket No. CI63-979, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the Order of the Federal Power Commission in this cause be, and the same is hereby, enforced.

September 8, 1965

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*Of the District of Oregon, sitting by designation.

Issued as Mandate: Oct. 18 1965.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21,693

UNITED GAS PIPE LINE COMPANY,
Petitioner,

VS.

FEDERAL POWER COMMISSION,
Respondent.

On Petition to Review and Set Aside Order of the Federal Power Commission

(OCTOBER 8, 1965)

On Petition for Rehearing

Before BROWN and GEWIN, Circuit Judges, and KILKINNY*, District Judge

PER CURIAM:

It is ORDERED that the Petition for Rehearing filed in the above entitled and numbered cause be, and the same is, hereby DENIED.

*Of the District of Oregon, sitting by designation.

APPENDIX D

Natural Gas Act

Section 1. (b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 7. (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or pre-

decessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of any application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service

proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.